

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TAMMY ORMAN,

Plaintiff-Appellee,

v

MICHAEL J. KRAFT and LINDA MARIE  
KRAFT,

Defendants-Appellants.

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UNPUBLISHED

October 21, 2003

No. 241962

Hillsdale Circuit Court

LC No. 00-000641-NO

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

Defendants Michael and Linda Kraft appeal by right from an order of the trial court, entering judgment on a jury verdict in favor of plaintiff Tammy Orman for injuries sustained when a deck collapsed at defendants' home. Plaintiff was awarded \$105,175.90, which included an award of \$14,307.35 for future medical or other health care expenses. We affirm.

I

Plaintiff sustained injuries when an elevated deck extending around defendants' summer home collapsed when family members attending a 1998 Fourth of July family reunion gathered on the deck for a picture. Defendants built the deck after submitting a design plan to the Hillsdale County Building Department (hereinafter "the county") and receiving a building permit. However, at the time of the collapse the deck had not yet received a post-construction inspection by the county nor had defendants secured the required certificate of occupancy.

Plaintiff filed this action seeking damages. Defendants filed a notice of nonparty fault pursuant to MCR 2.112(K), seeking an apportionment of fault to the county. The case proceeded to trial. The trial court declined to instruct the jury regarding apportionment of nonparty fault, finding that plaintiff had failed to establish a prima facie case against the county to warrant the instruction. The jury found defendants negligent and awarded plaintiff \$3,000 for past economic damages, \$25,000 for past noneconomic damages, \$52,000 for future noneconomic damages, and \$15,000 for future economic damages (future medical or other health care expenses). The trial court denied defendants' motion for a new trial.

## II

This Court reviews the trial court's grant or denial of a motion for a new trial for an abuse of discretion. *Morinelli v Provident Life & Acc Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). We find no abuse of discretion in the denial of defendants' motion for a new trial.

## III

Defendants argue that the trial court committed an error of law in dismissing defendants' notice of nonparty fault, MCR 2.112(K)(3). Defendants essentially argue that they were entitled to an apportionment of fault to the county regardless whether they established a breach of a legal duty or legal liability on the part of the county. That is, defendants assert that under the applicable statutes, MCL 600.2957 and MCL 600.6304, a finding of negligence or gross negligence is not required for an allocation of fault. Therefore, they were entitled to an apportionment of fault despite any immunity defense that the county may have. We disagree.

There can be no tort liability unless the defendant owed a duty to the plaintiff. *Jones v Enertel, Inc*, 254 Mich App 432, 437; 656 NW2d 870 (2002). A duty must first be proved before the issue of fault or proximate cause can be considered. *Id.* The adoption of the comparative negligence doctrine does not act to create negligence where none existed before. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 325; 661 NW2d 248 (2003); *Jones, supra* at 437. Defendants' argument, that it need only establish that the county's conduct was a proximate cause of plaintiff's injuries for an apportionment of fault, was rejected in *Jones*. *Id.* at 436-437. Defendants were not entitled to a new trial on the basis that the dismissal of the nonparty fault notice was an irregularity in the proceedings of the court that denied defendants a fair trial, MCR 2.611(A)(1)(a).

## IV

Defendants argue that the trial court abused its discretion in limiting the testimony of the current county building inspector, Martin Taylor, who was called as an expert witness by plaintiff and testified that the construction of the deck violated the building code. Defendants contend that they should have been allowed to cross-examine Taylor regarding whether defendants' deck design was defective and whether he would have approved their plan, to support their defense that the county should not have approved the plan and should not have issued the building permit for the deck. We find no abuse of the trial court's discretion.

This Court reviews a trial court's decision regarding the scope of cross-examination for an abuse of discretion. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Id.*

Defendants assert on appeal that a building permit should not be issued if the application does not comply with the State Construction Code and the requirements of other applicable laws and ordinances. However, as the trial court noted, the testimony at trial established that building inspectors exercise a certain amount of discretion and subjectivity in reviewing plans to determine whether a drawing/design submitted with an application for a building permit satisfies all applicable laws and ordinances as submitted, and warrants the issuance of a building permit. Defendants cite no record support for their position to the contrary.

Taylor was not the building inspector who reviewed and approved defendants' deck plans. The plans were reviewed and approved by a former building inspector, Don Figiel, who was not called as a witness at trial. Because the evidence established the subjective nature of the approval process, we cannot conclude that the court abused its discretion in limiting Taylor's testimony regarding his opinion of Figiel's subjective approval of the drawing/design in question. Defendants have not otherwise shown that the court abused its discretion in limiting Taylor's testimony, given the testimony and evidence. Defendants were not entitled to a new trial on the basis that the limiting of Taylor's testimony was an irregularity in the proceedings of the court that denied defendants a fair trial, MCR 2.611(A)(1)(a).

## V

Defendants argue that the jury award of \$15,000<sup>1</sup> in future medical expenses was excessive and against the great weight of the evidence because according to plaintiff's testimony, there was nothing more that the doctors could do for her back or leg pain. Further, plaintiff had not received treatment for her injuries since July 30, 1999, nearly two-and-a-half years before trial and plaintiff did not argue in closing argument that medical expenses would be incurred in the future.

A trial court's decision to deny a request for remittitur is reviewed for an abuse of discretion. *Henry v Detroit*, 234 Mich App 405, 415; 594 NW2d 107 (1999). In determining whether remittitur is appropriate, a trial court must decide whether the jury award was supported by the evidence. *Id.* at 414.

Given the medical testimony and evidence concerning plaintiff's injuries, the trial court did not abuse its discretion in denying defendants remittitur, and denying defendants' motion for a new trial on this basis. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498-499; 668 NW2d 488 (2003); *Henry, supra* at 414-415. Although there was testimony indicating that there was currently nothing more that doctors could do to alleviate plaintiff's pain, the jury's award was nonetheless supported by the evidence presented at trial. There was evidence regarding the costs that plaintiff had incurred for medical expenses as well as the potential need for medical care in the future. There was medical testimony that plaintiff was not a candidate for surgery and that the therapies, including the epidural steroid injections, to alleviate her lower back pain may

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<sup>1</sup> The award, reduced to present cash value, was \$14,307.35.

be temporary in nature. The jury could reasonably infer that medical or other health care costs would be incurred in the future. Despite plaintiff's testimony that she had discontinued treatment, there was evidence to support the jury award of \$15,000 for future medical expenses.

Affirmed.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Christopher M. Murray